BAIL SLIP

That the I Appellant/Accused No.1, Viz. Annamalai in Crl.A.No.440/2004 on the file of this High Court was enlarged on bail as per order dated 23.6.2004 and made in Crl.M.P.No.5527 of 2004 in Crl.A.440/2004.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 17.10.2006

CORAM:

THE HON'BLE MR. JUSTICE P.D. DINAKARAN
AND
THE HON'BLE MR. JUSTICE M. THANIKACHALAM

Crl.A.No.440 of 2004

1. Annamalai
2. Arumugam ..Appellants/Accused

vs.

Inspector of Police,
Tirupattur Taluk PS.
Vellore District.
Cr.No.1028 of 2002 ..Respondent/Complainant

Appeal filed under Section 374 Cr.P.C. against the Judgment in S.C.No.58/2003 dated 5.2.2004 passed by the Principal Sessions Judge, Vellore.

For Appellant-1 : Mr.A. Ramesh
for Ram & Ram
For Appellant-2 : Mr.T. Muniratnam Naidu
For Respondent : Mr.N.R. Elango
Addl. Public Prosecutor

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J U D G M E N T

M. THANIKACHALAM, J.

The appeal is directed against the conviction and sentence passed in S.C.No.58 of 2003 on the file of the Principal Sessions Judge, Vellore, where life sentence was awarded for both the accused under Section 302 I.P.C.

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2. At the instance of Tmt. Rani, sister of Krishnamurthy (the deceased), upon complaint, the respondent police investigated the allegations against the accused/appellants, which revealed that they have committed murder of Krishnamurthy, with intention, on 25.8.2002 at about 10.30 p.m. and therefore, they should be dealt with under Section 302 I.P.C., is the case of the respondent, in short.

3. The learned Principal Sessions Judge, Vellore by perusing the materials, satisfying herself to frame charges against the accused did so, but both the accused refused to plead guilty, resulting elaborate trial.

4. On behalf of the prosecution, 12 witnesses have been examined, seeking support from 26 exhibits and 12 material objects.

5. The learned Principal Sessions Judge, while analysing the evidence, applying the provisions of law as settled by the Courts of hierarchy, came to the conclusion, that for committing the murder by the accused, there was enmity, that because of the assault by both the accused, Krishnamurthy was killed amounting to homicidal violence, that the accused certainly would not come within the ambit of Section 304 I.P.C. whether Part I or Part II, that both the accused have assaulted Krishnamurthy, with deadly weapons with an intention to commit murder, preceded by motive and therefore, the offence must come only under Section 302 I.P.C., rejecting the plea for lesser offence also. Thus concluding as per the Judgment dated 5.2.2004 both the accused were convicted under Section 302 I.P.C. sentenced to undergo the minimum punishment of life imprisonment each and to pay a fine of Rs.1,000/- each, in default to undergo R.I for six months each, which is impugned in this appeal.

6. Facts leading to the conviction and appeal in brief:

(a) Thiru Krishnamurthy, the brother of P.W.1 and brother in law of P.W.2 is the resident of Adiyur Village, where the accused/appellants-brothers are living. P.W.3 Venugopal, P.W.4 Shanthaseelan also belonged to the same village. P.W.1 though originally belonged to Adiyur Village, after marriage, left the village and settled with P.W.2, the husband at Mallapadi Village. Thiru Krishnamurthy was doing business having lorry. At the request of Krishnamurthy, to perform some poojas, the sister-P.W.1 and brother-in- law -P.W.2 came to Adiyur Village on 25.8.2002.

(b) On 25.8.2002, during night hours at about 8.30 or so, the first accused and Krishnamurthy were chatting together in the pial of one Nandkumar's house, which was witnessed by P.W.3. All of a sudden when Annamalai, the first accused started to proceed from the said place, the deceased prevented him, by catching his dhothi, resulting undressed, in the presence of others, which was questioned by the

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first accused even using filthy language. Thus aggrieved by the conduct of Krishnamurthy, the first accused-Annamalai went to his house, brought his brother- the second accused, to question the conduct of Krishnamurthy.

(c) At about 10.30 p.m. on 25.8.2002, when P.Ws.1 & 2 were in the house of Krishnamurthy, the accused armed with M.Os.1 & 2 went to his house, questioned P.Ws.1 & 2, the whereabouts of Krishnamurthy, then finding he is not available in the house, went towards Mariamman Koil, where Krishnamurthy was sitting in the pial of one Vinayagam's house. P.Ws.1 & 2 sensing some danger to Krishnamurthy followed A-1 & A-2. On seeing Krishnamurthy, A-1 and A-2 attacked him, using M.Os.1 & 2 causing multiple injuries. P.Ws.1 & 2 having witnessed the incident, raised alarm and hearing the same, both the accused took their heels, which was also witnessed by P.W.3, a neighbour.

(d) Thiru Shanthaseelan, P.W.4 coming to know about the assault, took the injured to the hospital, where he was declared dead by P.W.6. Because of the fact, that the deceased person sustained injuries in the hands of others, recording those injuries in Ex.P7, the death was intimidated to the police under Ex.P8.

(e) The sister of the deceased, rushed to the police station immediately, preferred Ex.P1-complaint. On receipt of Ex.P1-complaint, on 26.8.2002 at about 00.35 hours, P.W.12 registered a case in Cr.No.1028/2002 under Section 302 I.P.C., prepared printed F.I.R.-Ex.P.20, which was sent to Judicial Magistrate No.II, Tirupattur through one Panneerselvam, Police Constable.

(f) P.W.12 taking the case for investigation, rushed to the scene of crime at about 1.45 a.m. on 26.8.2002, then observing the place in the presence of P.W.5 and another, prepared observation mahazar-Ex.P.2 as well as Ex.P.21-sketch. In the presence of the same witnesses, at about 3.30 a.m., from the scene of crime, P.W.12 recovered blood stained earth, sample earth, a dhothi, a pair of chappal i.e. M.Os.5 to 8 under Ex.P.3. The enquiry revealed that the dothi belong to the first accused Annamalai. He has also examined the witnesses recorded their statements.

(g) In continuation of the investigation, P.W.12 reached the Government Hospital, Tirupattur, conducted inquest between 6.30 and 9.30 a.m. over the body of Krishnamurthy in the presence of the panchayatars and the witnesses, for which Ex.P.22-report was prepared. Satisfying that the death must be due to homicidal violence and to confirm the same scientifically, P.W.12 requested the medical officer under Ex.P.18, through P.W.8 to conduct autopsy.

(h) P.W.8 identified the body to the doctor-P.W.11, who conducted autopsy over the body of Krishnamurthy on the same day at

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about 11.30 a.m., which revealed the following external as well as internal injuries, which are incorporated in Ex.P.19:

1. A cut injury extending from the front of left ear to the centre of the skull measuring about 15cm x 2 cm x brain deep. The skull is broken and the brain matter is seen as a pulp mixed with blood.

2. A cut injury in the centre of the skull about 5cm x 1cm x brain deep. The bone is broken.

3. A cut injury in the left neck about 3cm x 1/2cm x muscle deep. The veins and the nerves are cut in that area.

4. A lacerated injury in the left chest between 6th & 7th rib below the axilla about 5cm x 1cm x 2cm and bleeding is seen from the wound. The wound was dissected and on dissection the lung tissue below was ruptured and blood clots were seen. There was oozing from the wound present.

On dissection: The skull was broken in two places and brain matter was in a bloody mass.

The doctor has also opined that the deceased would appear to have died of shock and hemorrhage due to the injury sustained to the brain and lungs.

(i) After the postmortem, P.W.8 recovered M.O.10 and M.O.11 from the body of Krishnamurthy, and handed over the same to the Inspector under Ex.P.12. In continuation of the investigation, P.W.12 examined the witnesses recorded their statements. Upon information, at about 3.00 p.m., on the same day, he arrested both the accused in the presence of P.W.5 and another at the Adiyur Junction at Thirupur Salem Road. When the investigating officer examined the accused in the presence of P.W.5 and another, voluntarily the accused have given confession, informing the place, where the weapons were concealed, under Ex.P.4.

(j) Pursuant to the confession, M.Os.1 & 2 were recovered at about 5.30 p.m. under Ex.P.5. Thereafter at about 6.00 p.m., the investigating officer also recovered from the person viz., the second accused blood stained shirt-M.O.9 under the cover of mahazar Ex.P.6. Having noticed some injury on the person of Annamalai, he was sent for medical examination, to P.W.11, who has issued Ex.P.17 certificate, after examining him. From the witness-Nagaraj, M.O.12 was recovered under Ex.P.23. M.O.3 was recovered from one Venugopal under Ex.P.24 and M.O.4 was recovered from P.W.4 under Ex.P.25.

(k) The properties so recovered were submitted to the Judicial

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Magistrate No.II, Tirupattur. Under Ex.P.26, the investigating officer requested the Chief Judicial Magistrate to nominate a Judicial Magistrate to record statements under Section 164 Cr.P.C. who in turn under Ex.P.9, nominated P.W.7 to record the statements of the witnesses, which was performed by him, recording Exs.P.10 & P.11, statements from Venugopal and Nandakumar.

(l) On the basis of the request under Ex.P.13, P.W.9, as per the direction of the Judicial Magistrate No.II, Thirupathur, sent the material objects with covering letter Ex.P.14, which elicited Biological report, Ex.P.15 and Serologist's report Ex.P.16, as spoken by P.W.10. Thus completing the investigation when the Investigating Officer analysed its effect, it brought to surface that both the accused should have committed the offence in furtherance of the common intention and in this view, a final report came to be filed under Section 302 r/w 34 I.P.C. leading to framing of charge, on denial, leading to trial, ending in conviction, as stated supra, followed by this appeal.

7. Heard the learned counsel Mr.A. Ramesh appearing for the first appellant and Mr. T. Muniratnam Naidu apearing for the second appellant, as well as Mr.N.R. Elango, the learned Additional Public Prosecutor.

8. The learned counsel appearing for the accused/appellants would submit/ that the conviction and sentence are liable to be set aside for the following reasons viz.,

(a) that there is unexplained and inordinate delay in preferring the complaint, which should create doubt;

(b) that there are inconsistency and contradictions in the evidence of P.Ws.1 to 3;

(c) that there is no evidence, about the light aspect and this being the position, it is not possible for the witnesses to identify the assailants, which was not considered by the trial Court,

(d) that the witnesses examined on behalf of the prosecution are all interested and partisan witnesses, not worthy of credence,

(e) that there was no intention to commit murder, as well as there is no common intention also to commit murder and this being the position, convicting the accused both under Section 302 I.P.C. is not legally sound; and

(f) that even assuming that the offence has been proved or it is to be held that the accused are the cause for the death of Krishnamurthy, the offence would not come under Section 302 I.P.C. and

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if at all, maximum it should attract only Section 304 Part-II or Part-I I.P.C. and in this view, the accused deserves lesser punishment not life imprisonment or even the offence reported against the accused could be slashed down to 326 I.P.C.

Elaborating the above points at length, and taking us through the evidence as well as the law on the point of common intention, a case was advanced for acquittal, if not for modification as the last resort.

9. We have heard the learned Additional Public Prosecutor Mr.N.R. Elango on the above points. The learned Additional Public Prosecutor, taking us through the oral evidence of P.Ws.1 to 3, demonstrated how their evidence is natural, how the question of identity of the accused, would not come into consideration in this case, how both the accused should have shared the common intention, acted in furtherance of the same and therefore, the conviction slapped upon the accused under Section 302 IPC is sustainable, supporting the reasons assigned by the learned Principal Sessions Judge.

10. The fact, that the deceased by name Krishnamurthy met his end of life, by homicidal violence, is not very much disputed, but the dispute is concentrated as to who did the violence? As indicated by us, on the basis of the postmortem certificate-Ex.P.19, the deceased Krishnamurthy sustained four external injuries and one of the injuries sustained by him over the head was the cause for breaking the skull and sending out the brain matter outside, being fatal in nature. The opinion available in Ex.P.19, certified by P.W.11, not disputed, before us. Therefore, concluding unhesitatingly that Krishnamurthy died due to assault on 25.8.2002 at about 10.30 p.m., we have to see, who had caused the injuries as incorporated in Ex.P.19. Before going into that question, it is to be seen, as claimed by the learned counsel appearing for the appellants, Was there any delay in preferring the complaint? If so, what would be the consequences?

11. The incident had taken place on 25.8.2002 at 10.30 p.m. The injured was brought to hospital as spoken by P.W.6 at about 11.05 hours. After P.W.6 declared Krishnamurthy's death, his sister P.W.1 preferred a complaint to P.W.12 at about 00.35 hours. The printed F.I.R. and the original complaint reached the hands of the Judicial Magistrate at 4.30 a.m. on the same day, receiving the Court seal also subsequently dated 26.8.2002. The evidence given by P.Ws.1 & 2 regarding the time of giving Ex.P.1 may not loom large considering their mental status at that time and the further fact the date of examination of the witnesses. Therefore, taking advantage that P.W.2 has given evidence, as if the complaint was given at about 11.00 p.m. on the same day, the genuineness of Ex.P.1 cannot be doubted, which set the law in motion. Therefore, we are unable to find any delay much less inordinate delay, so as to say that this document should

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have come into existence, for the purpose of implicating the accused, later introducing their names, after the commencement of investigation or something like that. Hence the defence of delay and the benefits of doubt sought on that basis are rejected.

12. According to prosecution, prior to the actual assault of the deceased by the accused, there was some dispute between Annamalai i.e. A-1 and the deceased and it is their further case, at that time, the deceased fisted Annamalai, over the nose, causing some injury also. This case is spoken by P.W.3, who was present at that time. This incident is admitted by the accused also as seen from the answer given by him for question No.3, when he was examined under Section 313 Cr.P.C. It is also further strengthened by the medical evidence, which is also admitted by the accused, as seen from the answer given by him for question No.15. Thus the previous incident, which sparked the cause of action for the subsequent incident, where the deceased was assaulted, is admitted. Therefore, accepting the oral evidence of P.W.3, it should be construed, as held by the trial Court also, that because of the previous incident, viz., that Krishnamurthy assaulted the first accused, the subsequent incident had taken place, which is well spoken by P.Ws.1 & 2 supported by P.W.3. By going through the oral evidence of P.Ws.1 to 3, we are unable to find anything to disbelieve their oral testimony, since their evidence also inspired us being free from any doubt, more so natural.

13. Ex.P.7-Accident register says, that all the injuries received by the deceased krishnamurthy are cut injuries, punctured wound, thereby showing the injuries would have been caused by sharp edged weapon like, knife, billhooks, dagger, etc. as the case may be. Postmortem Certificate-Ex.P.19 also would reveal, that the deceased had not received any injuries, by assault, with stick, which would generally cause contusion, if at all inflicting lacerated wound at the most. Though Ex.P7 describes the 4th injury as the punctured wound, Ex.P.19 says the 4th injury is a lacerated injury in the left chest between 6th and 7th rib. This injury might have been caused by stick also, to some extent.

14. Taking the above facts into account, the learned counsel Mr.A. Ramesh appearing for A-1 would contend, that the first accused would not have caused any injury to the deceased by using M.O.2 and therefore, the evidence given by P.Ws.1 & 2 since contradicts the medical evidence, accepting their evidence may not be legally sound. Though the argument appears to be some what juicy at the first instance, giving our deep consideration, we are unable to pursuade ourselves, that this alone would make the evidence of P.Ws.1 & 2 undependable. As rightly submitted by the learned Additional Public Prosecutor the lacerated injury noticed by the postmortem doctor might have been caused by the stick and in this view, taking A-1, away from the offence, giving the benefit of doubts appears to be remote and

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hard. Assuming that A-1 has not played any positive role at the time of the actual assault, that alone will not take him away from the offence reported against him, considering his conduct viz., that he alone went to the house, brought his brother A-2, then assaulted Krishnamurthy. Thus whether there is overt act or covert act against A-1 or not, there is every possibility to bring A-1 under Section 34 of I.P.C., though he is not convicted under Section 302 r/w 34 I.P.C., which we will discuss infra, since there is no bar for convicting the first accused even in the absence of his inflicting any fatal injury to the deceased, bringing him under the meaning he acted in furtherance of the common intention, while the second accused assaulted the deceased. Because of the fact, as spoken by P.Ws.1 & 2, no injuries were noticed upon the body of Krishnamurthy, which would have been caused by stick. it may not be a ground at all, to give a clean chit of acquittal, to the first accused.

15. Law is well settled, that the evidence given by the relatives of the deceased or the victims is well admissible, and acceptable, in evidence, and if at all, more care is to be exercised while scanning the evidence of interested witnesses. If there was any strong possibility to doubt that the relatives are interested in roping the accused with the crime, due to any previous enmity, then there may be a chance to doubt about the veracity of their evidence. In this case, nothing is suggested even to P.Ws.1 & 2 why they attempt to implicate the brothers, and this being the position, considering the only fact that P.Ws.1 & 2 are related to the deceased, ignoring their evidence is impossible, and not permissible under law also.

16. The accused being brothers are known to P.Ws.1 to 3, not strangers. The incident took place in the village near the house of one Nandakumar, as seen from Ex.P.21-sketch as well, as described in the observation mahazar-Ex.P.2. It is also noted in Ex.P.21, that there is an electric light burning, at a distance of 30 ft. away from the scene of crime. It is the common knowledge, that in the houses, there might have been light, because of the night hours. Under the above said circumstances, there might not have been any difficulty for P.Ws.1 to 3 to identify the accused at the time of the assault and therefore, the absence of evidence regarding the light aspect will not eclipse the case of the prosecution, creating any indelible doubt, warranting any compulsion, on our part to extend the benefits of doubt.

17. The investigating officer would state, that as per the confession given by the first accused-under Ex.P.4, M.Os.1 & 2 were recovered under Ex.P.5. The billhook and the stick so recovered were sent for chemical examination as well as for serologist's report, as spoken by P.W.9, supported by P.W.10. Ex.P.16 would reveal, that the billhook and wooden log contained human 'B' group blood, which is the blood group of the deceased, since his lungi, which was recovered

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after the postmortem also would reveal as per the serologist's report that it does contain human 'B' group blood. The shirt worn by P.W.4 viz., M.O.4 was also recovered and sent for chemical examination. It also revealed the blood of human 'B' group. Thus, we can come to the conclusion, that the blood group of the deceased was group 'B'. Since the billhook and wooden log recovered on the basis of the confession, also contained blood 'B' group, an argument was advanced, on behalf of the prosecution that because of the fact, these two weapons had been used by both the accused, they contained 'B' group blood of the deceased, which is repelled by Mr.A.Ramesh, the learned counsel for the first appellant, taking us to the inconsistency available in the confession as well as in the evidence let in to prove the alleged recovery.

18. Ex.P.4 confession does not disclose about the wooden log whereas it would say that knife or billhook alone was concealed in the sugarcane field. But Ex.P.5-recovery mahazar would state as if both M.Os.1 & 2 were recovered pursuant to the confession. In Column No.5 of the Mahazar also, it is not specifically stated, since there are two accused, upon whose confession the M.Os. were recovered. It is the case of the prosecution that the second accused alone had used M.O.1, whereas the first accused used M.O.2. This being the position, the alleged recovery of M.O.1 on the basis of confession said to have been given by the first accused may not come to the aid of the prosecution to corroborate the oral evidence of P.Ws.1 & 2. However, in our view, this inconsistency is not going to tilt the balance in favour of the accused, since we are inclined to accept the oral evidence of P.Ws.1 to 3, because of its inspiring nature. Therefore, the defective investigation projected by P.W.2 should be ignored and if at all much reliance cannot be placed, taking into account the blood group noticed in M.Os.1 & 2.

19. The sister of the deceased P.W.1 and the brother-in-law of the deceased-P.W.2 have vividly picturised the incident, narrating the acts of both the accused including the attack, by each causing injuries. P.Ws.1 & 2 have stated that at about 10.30 p.m. both the accused came to the house of Krishnamurthy and questioned them about the whereabouts of Krishnamurthy, then left the place towards Mariamman Koil. It is their further case, when they have followed the accused, they have seen both the accused assaulting Krishnamurthy using M.Os.1 & 2. P.Ws.1 & 2 have specifically stated that Annamalai, the first accused assaulted Krishnamurthy using the stick over the head, left side of the neck, left hand, left ear etc. It is too much for the court, to expect, corresponding injuries, since, even there may be exaggeration. As duty bound, it is for us to assess the veracity of the evidence. They also withstood the acid test of cross examination, not corroding the evidence. True as pointed out supra, no corresponding exact injuries are noticed in the body of Krishnamurthy. Therefore, the evidence given by P.Ws.1 & 2, that the first accused

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assaulted the deceased Krishnamurthy using M.O.2 may not be correct to the entire extent. But his presence cannot be ruled out, since he is the cause of action for the incident. They have further testified that the second accused assaulted Krishnamurthy with MO.1 causing bleeding injuries. The Accident Register copy and postmortem certificate would reveal corresponding cut injuries over the body of Krishnamurthy. Therefore, we do not find any difficulty in fixing the second accused as the person, who had caused all the cut injuries over the body of Krishnamurthy, which terminated his life, as concluded early.

20. P.W.3, who is known very well to the accused has given evidence, in a natural way, giving no possibility to ignore the same. He would state that on 25.8.2002 at about 10.00 p.m. when he along with Viswanathan, Nandakumar were viewing the TV, heard noise in the street, when rushed there, he had seen Annamalai assaulting Krishnamurthy with stick, while Arumugam cut Krishnamurthy nearby left ear, left neck, left chest etc. He has further stated that when the people gathered, both the accused ran away from the scene of crime. By going through the cross examination very carefully, we are unable to see any infirmity, to ignore the evidence, which inspired us. Thus the oral evidence of P.Ws.1 & 2 is fully corroborated, strengthened by the oral evidence of P.W.3, which is supported by the medical evidence also.

21. The learned trial Judge considering the evidence of P.Ws.1 & 2 elaborately, in addition to the evidence of P.W.3 has come to the conclusion correctly and legally, fixing the culpability upon the accused, in which we are unable to find any error either on facts or in applying the principles of law. In this view, accepting the oral evidence of P.Ws.1 to 3, we conclude unhesitatingly that because of the acts done by both the accused, Krishnamurthy sustained injuries, succumbed to the same, resulting termination of his life, which should come within the meaning of murder.

22. The learned counsel appearing for the appellants having made an endeavour to make some tears into the fabric of the testimony of P.Ws.1 to 3, then failing to satisfy us that there is any infirmity for the rejection as well in the findings rendered by the learned trial Judge, regarding the reliability of the evidence of P.Ws.1 to 3 and further finding it difficult to turn the table regarding the evidence against the accused, which is formidable in nature being trustworthy, made an attempt to slash down the offence from Section 302 to 304 (II) I.P.C. This kind of argument was advanced before the trial Court also, but not accepted. In this regard, we have to recapitulate the legal position as ruled by the Apex Court as on this date.

23. As ruled by the Apex Court in Dhirajbhai Gorakhbhai Nayak v. State of Gujarat (2003 (9) SCC 322), the help of Exception 4 to

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Section 300 I.P.C. can be invoked if the death is caused,

(a) without premeditation,

(b) in a sudden fight,

(c) without the offenders having taken undue advantage or acted in a cruel or unusual manner, and

(d) the fight must have been with the person killed.

It is also further held, whether the incident would have taken place due to heat of passion, it must be seen that there must be no time for the passion to cool down. On the other hand, if it is shown by facts, that there was a chance to come to the conclusion that the heat of passion should have come down or diminished or cool down on its own, then invoking exception (4) to Section 300 I.P.C. may not be possible and desirable. Further, there must have been a fight between the parties involving more than one person minimum being two persons to have a fight. The same position is reiterated in plethora of decisions rendered by the Apex Court including Sachchey Lal Tiwari v. State of U.P. (2004 11 SCC 410).

24. In order to apply the above principle or to bring the offence under Section 300 exception (4) I.P.C, the assault committed by the person, who claims such benefit, should not come within the meaning of "acted in a cruel or unusual manner" also. How this is to be decided is declared by the Apex Court in Babulal Bhagwan Khandare v. State of Maharashtra (2005 10 SCC 404), wherein their Lordships of the Apex Court have held as follows:

> "Where the offender takes undue advantage or has acted in a cruel or unusual manner, the benefit of Exception 4 cannot be given to him. If the weapon used or the manner of attack by the assailant is out of all proportion, that circumstance must be taken into consideration to decide whether undue advantage has been taken. In the instant case blows on vital parts of unarmed persons were given with brutality. The abdomens of two deceased persons were ripped open and internal organs had come out. In view of the aforesaid factual position, Exception 4 to Section 300 I.P.C. has been rightly held to be inapplicable.

Having the above principles in mind, it is to be seen whether the accused have assaulted the deceased without premeditation in a sudden fight in the heat of passion upon a sudden quarrel etc. Before that it is to be also seen whether the accused had the intention to commit murder so as to bring the acts of the accused under the exceptions available to Section 300 I.P.C.

25. Section 300 I.P.C. defines murder. Under this Section, intention plays crucial role. If the act is done with the intention of causing bodily injury and the bodily injury intended to be inflicted

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is sufficient in the ordinary course of nature to cause death that also would come within meaning of murder. It is in evidence, as spoken by the postmortem doctor, the injury inflicted upon the deceased or the injury received by the deceased, are sufficient in the ordinary course of nature to cause death and this can be inferred from the nature of head injury also, which caused fracture, oozing out the brain matter. Therefore, we are unable to entertain any doubt, that the act so done by the accused, in this case, was only with an intention of causing bodily injury, which may be sufficient in the ordinary course of nature to cause death, but not certainly with an intention to commit murder, which could be seen from the evidence of the prosecution itself.

26. Admittedly and as spoken by PW.3 also, the original cause of action for this case has arisen only from the side of the deceased. When the deceased and the first accused were sitting together probably being friends also. there was some wordy altercation followed by abrupt ending of the same when the first accused attempted to leave the place. On seeing this, at the first instance, the deceased alone had pulled the dothi of the first accused and when the same was questioned by the first accused probably using filthy language also, the deceased fisted him on the nose causing bleeding injuries. Thus it is an admitted fact that the first accused received injury in the hands of the deceased, at the first instance on 25.8.2002 at about 10.00 p.m. as disclosed in Ex.P.17, which is spoken by PW.11, admitted by the first accused. Though PW.3 would state that the said incident had taken place at about 8.30 p.m., the evidence given by PW.11 supported by ExP.17 is not erased. The time factor spoken by P.W.3 may not be correct to the entire extent since it is admitted by PW2 in the cross examination that while the incident had taken place, the first accused was wearing only Jatti and his dothi was in the scene of crime, which was recovered subsequently by the investigating officer. Under the above said circumstances, we are inclined to conclude, that the injuries caused by the deceased, to the first accused must be just prior to the incident in which the deceased sustained injuries or in other words, it must be the continuation of the first incident, giving no time to cool down, from the heat of passion. True, the first accused after sustaining injury in the hands of the deceased went to the house, fetched A-2 his brother, then this incident had taken place. However, the time consumed, for this may not be sufficient in the ordinary course to cool down, which is further strengthened by the oral evidence of P.W.2. P.W.2 admits, that when the accused have assaulted the deceased, the first accused was only with Jatti, thereby showing by the act of the deceased, he was undressed, that too in the presence of others. The dothi was recovered from the scene of crime, as disclosed by the evidence. From the above facts, as well from the attending circumstances, it is to be inferred that because of the act done by the deceased, causing fight, there was heat of passion and there was no time for cooling down also, which is further evident from

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the evidence given by P.Ws.1&2.

27. The submission of the learned counsel for the accused/appellants, that the accused had no intention to commit murder or even had no intention to commit serious bodily injuries immobilising Krishnamurthi, is exposed from the complaint given by P.W.1 as well as from the evidence given by P.Ws.1 & 2. Because of the previous act, taking it as motive, if A-1 and A-2 had decided to kill Krishnamurthy, in the normal circumstances, they would not have stated when questioned by P.Ws.1 & 2, that Krishnamurthy will come and tell regarding the problems or dispute. P.Ws.1 & 2 have categorically deposed that when they have questioned the accused, why they are searching Krishnamurthy, they replied that Krishnamurthy will come and inform about this and the relevant deposition in Tamil reads:

"நான் என்ன பிரச்சனை என்று கேட்டேன். கிருஷ்ணமூர்த்தியே சொல்வான் என்று கூறினார்கள்."

It is the case of P.W.1 also, at the earliest point of time when she preferred Ex.P.1, wherein also it is stated, "என்ன தகராறு என்று கேட்டதற்கு உன் தம்பி வந்து சொல்லுவான் என சொல்லிக் கொண்டே ரோட்டுக்கு போனார்கள்". As rightly submitted by Mr.Muniratna Naidu, the learned counsel appearing for the second accused, if both the accused had the intention to commit the murder of Krishnamurty, or had the intention to cause bodily injury, which are likely to cause death, to their knowledge, certainly there would not have been any possibility for them to say so. The very fact that the accused have informed to P.Ws.1 & 2, that 'Krishnamurthy will come and tell' would suggest undoubtedly and unquestionably also, that they have no intention to commit murder of Krishnamurthy or no intention to immobilise him also, and if at all, they should have thought of teaching a lesson to the deceased for the act done by him in the presence of others, to the first accused viz., pulling the dothi, thereby making him undress, leaving him with Jatti creating disgrace. For these reasons, we are of the considered view that the accused had no intention to commit murder of Krishnamurthy. Thus concluding, we have to see further, the act of the accused, whether it would attract exception (4) to Section 300 I.P.C.

28. The assault by the deceased and the assault by the accused had taken place at different time, according to the prosecution. Though there is some evidence for this, if true, certainly the first accused would not have come to the scene of crime, with Jatti. Only from the scene of crime, as spoken by the investigating officer, the dothi belongs to the first accused viz., M.O.8 was recovered under Ex.P.3. This would suggest, in continuation of the first attack by the deceased, the second incident viz., attack by the accused could have taken place, thereby showing there was no time for the accused to cool down, that too considering the words uttered by the deceased, as spoken by P.W.3. P.W.3 would state, that the first accused questioned the conduct of the deceased as if he had disgraced him in the presence

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of others and unable to bear the same, the deceased fisted Annamalai followed by fight between the first accused and the deceased. Because of this act alone, A-2 was brought to the scene of crime and A-2 on seeing his brother was assaulted, unable to tolerate the same should have attacked the deceased only due to heat of passion, preceded by sudden fight, where filthy language also appears to have been used, thereby brining the act of the accused within the four walls of the exception (4) to Section 300 I.P.C.

29. The confession statement given by the accused though not admissible in evidence in entirety, as ruled by the Apex Court, it can be looked into to find out the mitigating circumstances such as whether the accused had acted in the heat of passion, what was the motive etc. In the confession statement given by the first accused on 26.8.2002, he had specifically stated that the first incident had taken place at about 10.00 p.m. on 25.8.2002 in the pial of Nandakumar's house. It is also the case of the first accused in the confession that Krishnamurthy, who came there, requested him to get cigarette, for which he said he had no money and immediately, Krishnamurthy searched his pocket and thereafter pulled his dothi also and refused to hand over the same, despite request. It is the further case of the first accused when he attempted to snatch the dothi from the deceased Krishnamurthy, he fisted him over his nose, which was conveyed by him immediately to his brother and on seeing that the nose is bleeding, the second accused got wild, came to the scene of crime and assaulted Krishnamurthy, though used knife. From the averments available in the confession statement given by A-1, it is made clear that the acts are in continuation, not giving any gap to subsidise the heat of passion or cool down, which is the result of the fight between the deceased and the first accused. In this view, we are of the considered opinion, that the accused have not attacked the deceased, with premeditation, that too, with an intention to commit murder and if at all, they had attacked the deceased, unable to control themselves, due to heat of passion, because of the fact the deceased had caused injury to the first accused at the first instance. The evidence as detailed above unclinchingly proves, that the second accused used deadly weapons, caused head injuries, resulting brain matter coming out, which would indicate that the accused knew causing such bodily injury, is likely to cause death, thereby attracting only the first part of 304 I.P.C. and certainly, not later part of 304 I.P.C. Hence we conclude for these reasons, that the act of the second accused squarely comes under Section 304 (I) I.P.C. Thus fixing the culpability of the 2nd accused, we have to see, whether it could be attributed to the first accused also. As we have already pointed out, in the body of Krishnamurthy, there was a lacerated wound and that kind of wound would have been caused by using M.O.2, the stick.

30. A Constitution bench of the Apex Court in Suresh v. State of U.P. 2001 SCC (Cri) 601 has analysed the scope of Section 34 I.P.C.

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and its applicability, in detail tracing out the history from 1880 onwards. In paragraph-23 of the Judgment it is held:

> "Thus to attract Section 34 IPC two postulates are indispensable: (1) The criminal act (consisting of a series of acts) should have been done, not by one person, but more than one person. (2) Doing of every such individual act cumulatively resulting in the commission of criminal offence should have been in furtherance of the common intention of all such persons."

It is further held in para-24 as follows:

> "So the act mentioned in Section 34 IPC need not be an overt act, even an illegal omission to do a certain act in a certain situation can amount to an act, e.g. A co-accused, standing near the victim face to face saw an armed assailant nearing the victim from behind with a weapon to inflict a blow. The co-accused, who could have alerted the victim to move away to escape from the onslaught deliberately refrained from doing so with the idea that the blow should fall on the victim. Such omission can also be termed as an act in a given situation. Hence an act, whether overt or covert, is indispensable to be done by a co-accused to be fastened with the liability under the section. But if no such act is done by a person, even if he has common intention with the others for the accomplishment of the crime, Section 34 I.P.C cannot be invoked for convicting that person. In other words, the accused who only keeps the common intention in his mind, but does not do any act at the scene, cannot be convicted with the aid of Section 34 IPC."

Thus it is seen, in order to rope in an accused under Section 34 I.P.C., the participation in the crime, in furtherance of common intention is a sine quo non. In para-30 of the Judgment, it is further observed, relying upon a previous decision that it is not necessary that any overt act should have been done by the co-accused, in order to attract Section 34 I.P.C.

31. In Krishnan v. State (2003 SCC (Cri) 1577), the scope of Section 34 I.P.C. is analysed and it is ruled under what circumstances Section 34 I.P.C. could be made applicable to a particular case, wherein it is held as follows:

> "Question was whether the accused persons in furtherance of their common intention caused the death of the deceased on the alleged date, time and place. A charge under Section 34 IPC presupposes the sharing of a particular intention by more than one person to commit a criminal act. The dominant feature of Section 34 is the element of participation in actions. This participation need not in all cases be by

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physical presence. Common intention implies acting in concert. There is a prearranged plan which is proved either from conduct or from circumstances or from incriminating facts. The principle of joint liability in the doing of a criminal act is embodied in Section 34 IPC. The existence of common intention is to be the basis of liability. That is why the prior concert and the prearranged plan is the foundation of common intention to establish liability and guilt."

Having the above said principles, which rules the roaster, as on this date on the point 'in furtherance of the common intention' as enunciated in Section 34 I.P.C. it is to be seen whether A-1 could be convicted under Section 304 Part I r/w Section 34 I.P.C.

32. As established by the evidence, only the first accused, brought the second accused to the scene of crime immediately to the previous incident or otherwise. But for the first accused's request, the second accused would not have come to the scene of crime and attacked the deceased using deadly weapon viz., knife. It is also proved beyond reasonable doubt, that the first accused also participated in the actual assault by using stick, though there is some exaggeration about the acts committed by the first accused. Thus it is proved beyond all reasonable doubt, the presence of A-1 at the scene of crime, as well as participation to some extent, which discloses his intention to act in furtherance of the common intention and in this view, we are inclined to conclude, that the first accused also should be dealt with under Section 304 Part-I I.P.C. r/w 34 I.P.C. and not under any other Section, as urged on behalf of the first accused viz., 326 I.P.C. or under any other provisions. In the light of the above discussion, the conviction and sentence slapped upon the accused should be sealed down to 304 Part-I IPC r/w 34 IPC setting aside the conviction and sentence under Section 302 I.P.C. against both the accused.

33. In the result, the appeal is allowed in part, setting aside the conviction and sentence under Section 302 IPC., and convicting both the accused under Section 304 Part-I r/w 34 IPC, sentencing them each to undergo 7 years rigorous imprisonment, in addition to the fine already imposed by the trial Court giving set off the period of remand.

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It is reported that the first accused was released on bail by this Court as per the order in Crl.M.P.No.5527 of 2004 dated 23.6.2004 and therefore the first accused is directed to surrender forthwith, before the court concerned to undergo the remaining period of imprisonment. On his failure to surrender, the trial Court is directed to take appropriate steps, to secure the first accused to undergo the the remaining period of sentence.

kv

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

TO

1. THE PRINCIPAL SESSIONS JUDGE
VELLORE

2. THE JUDICIAL MAGISTRATE NO.II
TIRUPPATHUR

3. THE DISTRICT COLLECTOR
VELLORE

4. THE DIRECTOR GENERAL OF POLICE
VELLORE

5. INSPECTOR OF POLICE
TIRUPATHUR TALUK POLICE
TIRUPPATHUR, N.A. DISTRICT.

6. THE INSPECTOR OF POLICE
TIRUPPATHUR TALUK POLICE STATION
TIRUPPATHUR

7. THE PUBLIC PROSECUTOR
HIGH COURT, MADRAS

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1 CC TO MR. RAM & RAM SR 48797
1 CC TO MR.T. MUNIRATNAM NAIDU, SR 49058

CRL.A.No.440 OF 2004

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17.10.2006

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